IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

MARTHA H. OLIN, AS ADMINISTRATRIX OF THE ESTATE OF WALTER G. OLIN, DECEASED,
Petitioner and Appellant below,

vs.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY OF BOSTON, MASS.,
Respondent and Appellee below.

No. 646.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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SUBJECT INDEX

	Page
Statement—Additional Facts	1
Scope and the Nature of Issues	2
Objections to Allowance of Petition	3
Argument	4
Question One of Construction of Contract Language	4
Policy Provisions	4
Statutory Provisions	5
Construction Must Be Reasonable	6
No Indiana Case Construing the Language	7, 8
Reasonableness of the Rule That Indebtedness Against the Reserve Reduces Purchase Power of Reserve for Extended Insurance	8
Decision More Favorable to Petitioner Than the Statute or the Contract Required	9
Not the Province of a Writ of Certiorari to Obtain Review and Settlement of the Unsettled Law of a State	9
Conclusion	9, 10
Appendix	11

TABLE OF CASES

Page

Bach v. Western State Life Ins. Co. (C. C. A. 10), 51 Fed. (2d) 191 ..... 6, 8

Equitable Life Ins. Co. of Iowa v. Horner, 97 Ind. App. 347, 182 N. E. 463 5

Equitable Life Insurance Co. v. Taylor, 106 Ind. App. 508, 17 N. E. (2d) 851 7

Life Ins. Co. of Va. v. Sluss, 105 Ind. App. 274, 11 N. E. (2d) 500 8

Metropolitan Life Insurance Co. v. Winiger, 12 N. E. (2d) 1008, 17 N. E. (2d) 86, 215 Ind. 120 ..... 7, 9

Pacific Mutual Life Ins. Co. of California v. Davin (C. C. A. 4), 5 Fed. (2d) 481 ..... 6, 8

Reserve Loan Life Ins. Co. v. Brammer, 83 Ind. App. 584, 146 N. E. 876 ..... 6, 8

Waddell v. New England Mutual Life Insurance Co., 83 Ind. App. 209, 147 N. E. 816 ..... 6, 8

TABLE OF STATUTES

Acts 1909, Ind., Ch. 95, Sec. 1 11

Acts 1909, Ind., Ch. 95, Sec. 5 11

Acts 1909, Ind., Ch. 95, Sec. 5, Subsec. 9 ..... 5, 11

Acts 1909, Ind., Ch. 95, Sec. 5, Subsec. 10 ..... 5, 8, 12

Acts 1909, Ind., Ch. 95, Sec. 8 12

Acts 1909, Ind., Ch. 95, Sec. 9 ..... 5, 9, 12

Acts 1909, Ind., Ch. 95, Sec. 6, Subsec. 5 13

Acts 1925, Ind., Ch. 195, Sec. 5, Subsec. 10 ..... 8, 14

Acts 1925, Ind., Ch. 195, Sec. 1 13

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I

STATEMENT

A. Additional Facts

The policy provided for such extended insurance, on default of premium payments, as was purchasable by the *then* cash value (reserve) of the policy (R. p. 53); *"Cash Value", as of any time, being defined in the policy as value in cash (full cash reserve as shown by the table of values) less indebtedness* (R. pp. 52, 53).

The policy stated that the extended insurance values in the table were equivalent to the full reserve and provided that they should be subject to decrease *proportionately* by any indebtedness against the policy (R. p. 53).

(Italicized words supplement Statement of the Petition, *Cf., id.,* p. 6).

Respondent's answer, to Petitioner's counterclaim, expressly denied that the Petitioner was entitled to extended insurance for the face of the policy less indebtedness and for a term purchasable by the full reserve, (R. p. 32 (11)).

B. Scope and Nature of Issues

The petition, as briefed by the Petitioner, is intended to present all questions raised by Petitioner (not by Respondent) in the appeal, and seeks complete disposition of the whole cause in ruling on the Petition (Petitioner's Brief, p. 45).

The questions, so presented, go essentially to claim of error in the Circuit Court's construction of the language in the policy clauses relating to "Cash Value", "Extended Insurance" and "Table of Loan, Cash, Paid-up and Extended Insurance Values" (R. pp. 52, 53, 109).

OBJECTIONS TO ALLOWANCE OF PETITION

1. The questions raised by the petition are not within the purposes of writs of certiorari.

(a) The questions relate to construction of particular contract language not construed by any Indiana Supreme or Appellate Court decision or by any other United States Circuit Court of Appeals decision.

(b) The decision approved alternative formulae for computation of extended insurance, which were substantially in accord with and more favorable to the petitioner than the formula applied by Indiana decision under the applicable statute.

(c) Review for settlement of law, unsettled by decisions of a state court, is not within the purposes of a writ of certiorari.

II

ARGUMENT

The Circuit Court of Appeals regarded the question before it as one of construction of the particular language of the policy, and considered that the contract, viewed in its entirety, contemplated the appropriation for extended insurance purposes of only so much of the reserve value as remained after deducting the indebtedness against the policy, (R. p. 109).

In respect of the cash and premium loan clauses of the policy (R. p. 51), the Circuit Court noted that both such classes of loans constituted a lien against the policy and reduced the reserve value against which loans could be made (R. 109). It was clear that the reserve value upon which any extended insurance could be predicated was subject to loan and to absorption by loan, and that when all the reserve value was subjected to loan, there would be nothing at all to carry any extended insurance.

The "Table of Loan, Cash, Paid-up and Extended Insurance Values", clause (R. p. 53) provided that the reserve values were to be decreased by indebtedness on the policy (R. pp. 53, 109). The indebtedness was chargeable solely against the reserve (R. p. 51). The cash value or actual reserve value at any time, was the table value reduced by, or in accord with, any indebtedness (R. 52, 53). The policy, the Circuit Court found, negatived any contention that it was the intent to give extended insurance purchasable by the full table cash value or reserve, regardless of the state of exhaustion of the reserve by indebtedness charged solely against and collectible only from the reserve.

The statute to which the petition referred was, by Indiana decision, a part of every Indiana insurance contract (Equi-

table Life Ins. Co. of Iowa v. Horner, 97 Ind. App. 347, 182 N.E. 463, 465 (2)). The statute required policy provision for: (1) a table of values or options based on full reserve, (Acts 1909 Indiana, Sec. 5, Subsec. 7, Ch. 95); (2) loans up to the amount of the cash value of the policy and secured only by the policy (Subsec. 9, *id.*); (3) extended insurance as shown in the table of values and options, but subject to provision that the amount or term of such insurance should be reduced in the ratio that such indebtedness bore to the net value of such extended insurance; (4) surrender for cash in an amount equal that which would be available for purchase of extended insurance, (Subsec. 10, *id.*); (5) and, it may be noted, for issuance in Indiana, by insurance companies organized in other states, of policies containing provisions proper under the laws of such other states, (Acts 1909 Indiana, Sec. 9, Chapter 95).

If the policy issued by a Massachusetts Insurer, were governed by the Indiana statutory provisions (and Respondent is not briefing that question now) it would be so governed, or the statutory provisions read into it, only to the extent that its language was in conflict with the Statute.

The provision, for determining the cash value at any time after lapse of the policy for failure of premium payment, was the same in the policy as in the statute. Cash value was defined in the policy as a value in cash (the value shown by the full reserve table less indebtedness) (R. pp. 52, 53). The statutory provision was for surrender, for cash, in the amount which would be available for purchase of extended insurance (which amount was the full reserve reduced by indebtedness.) (Acts 1909 Indiana, Ch. 95, Sec. 5, Subsec. 10).

If the intent of the policy was to be ascertained from a construction of its related parts rather than a construction

of a single phrase or clause, the conclusion of the Circuit Court that the extended insurance was to be computed on the purchase power of reserve value as affected by indebtedness, would appear to be a necessary conclusion if reasonable meaning and common usage of words were to be given their normal effect.

In construing the language of an insurance contract, if there is an ambiguity susceptible to two or more equally, logical and reasonable constructions, that construction most favorable to the insured will be applied.

But the ambiguity must first exist, and it does not exist because one phrase, one sentence, or one paragraph standing alone may not state or clearly show the whole contractual undertaking in such respect. If and when the whole contract is viewed, an ambiguity appears, the rule of reasonableness of any construction to be applied is a dominant rule.

The Circuit Court found no ambiguity in the expressed intent of the policy. The intent found was substantially that approved by legislative enactment and was that which courts have recognized as essential to continue solvency and protection for insurance risks. Reserve Loan Life Ins. Co. v. Brammer, (Ind. App., 1925), 146 N.E. 876, 878; Bach v. Western State Life Ins. Co., (C. C. A. 10) 51 Fed. (2d) 191, 192 (1); Pacific Mutual Life Ins. Co. v. Davin, (C. C. A. 4) 5 Fed. (2d) 481, 484.

The particular language, here involved, has not been construed by an Indiana decision. The policy in Waddell v. New England Mutual Life Insurance Co., 147 N.E. (Ind. App.) 816, contained a provision for deducting indebtedness from the face amount of the policy, but "no provision whatever for deducting indebtedness from the cash value" in computing extended insurance, (*id.*, 818, L.).

Equitable Life Insurance Co. v. Taylor, 17 N.E. (2d) (Ind. App.) 851, referred to by the Circuit Court (R. 108), considered whether the insured had elected to take paid-up insurance or was entitled to extended insurance. After lapse of the policy, without indebtedness, the insured had borrowed the cash value of the policy. The insurer claimed the insured was entitled only to paid-up insurance. The Appellate Court held that no provision in the policy or statute prevented borrowing on extended insurance or, at least, no such provision has been pointed out or found, and, there being some evidence to sustain the jury's verdict that the loan was made against extended insurance, the judgment was affirmed. The policy, the circumstances and the question, in that case, were far removed from those considered by the Circuit Court here.

No Indiana or Circuit Court of Appeals' decision, referred to in the petition, construes the language here. So far as appears, the language construed in any Indiana decision is different from that construed in any other, except in Metropolitan Life Insurance Co. v. Winiger, which the Appellate Court decided one way, 12 N.E. (2d) 1008, and the Indiana Supreme Court another, 17 N.E. (2d) 86, 215 Ind. 120. The Indiana decisions each turn on the particular language under consideration and they adduce or settle nothing which could be considered a precedent for construction of any other language of possible different purport.

Metropolitan Life Insurance Co. v. Winiger, 12 N.E. (2d) 1008, 17 N.E. (2d) 86, illustrates to some extent the divergence in decisions.

Waddell v. New England Mutual Life Insurance Co. was decided October 24, 1924 (83 Ind. App. 209). It

held, by way of dictum, that if the policy, there, had contained provisions, such as here, for deduction of indebtedness from face amount of the policy and also in determining the amount of reserve to purchase extended insurance, such provisions would have been manifestly "unfair" as double credit (double deduction) of the indebtedness. At the next session of the Indiana legislature (March 1925) the 1909 act was so amended as to put beyond question the fairness of policy provisions for deduction of indebtedness from net value or reserve to determine the "net single premium to purchase extended insurance equal either to the face of the policy or the face of the policy less indebtedness" (Acts 1925, Ind., Ch. 195, Sec. 5, Subsec. 10). Thus, was formally recognized, by enactment, the fact that a larger amount of extended insurance for a shorter term and a smaller amount for a longer term are insurance equivalents if they are each purchasable by the same net single premium. And this fact or principle was recognized or applied in Life Ins. Co. of Va. v. Sluss, (Ind. App.) 11 N.E. (2d) 500.

The decisions in Indiana and in United States Circuit Courts of Appeals, holding that it is fair, sound and settled insurance practice to provide for reduction of the purchase power of reserve, when the reserve is subjected to indebtedness, are an indication of the reasonableness of the apparent intent of the contract here. Reserve Loan Life Ins. Co. v. Brammer, (Ind. App., 1925) 146 N.E. 876, 878; Bach v. Western State Life Ins. Co., (C. C. A. 10) 51 Fed. (2d) 191, 192 (1); Pacific Mutual Life Ins. Co. v. Davin, (C. C. A. 4) 5 Fed. (2d) 481, 484.

The Circuit Court's opinion recognized the general principle and purpose of the formula in the case of Metropolitan

Life Ins. Co. v. Winiger, 17 N.E. (2d) 86; it recognized, too, that the 1909 act did not permit the proportional reduction of both amount and term of extended insurance but that it did provide for either the amount or the term to be reduced by indebtedness in the ratio of the indebtedness to the reserve (R. p. 110). The Circuit Court's opinion states no specific principle of law, reaches no result and applies no formula that is not supported in broad, general principle, or on analogy, by some Indiana decision.

While the Petitioner has briefed, herein, all the material questions raised by her on appeal, several material questions which the Respondent would desire to urge on general review of full merits, are not now briefed by it. Without limiting the scope of such questions, attention is called to the Indiana statute, Acts 1909, Ch. 95, Sec. 9, providing that policies issued by insurance companies of foreign states, may include provisions approved by the law of such states.

CONCLUSION

The free cash reserve at time of default was $5.30 (Petitioner's brief, p. 7, o and q). The insured paid, in cash, premiums of only $1170 (R. 43, 44) and had insurance for $10,000 for 9 years, from date of policy September 1922 to lapse September 1931 (R. pp. 38, 41).

The Circuit Court's opinion gives the Petitioner more than the Indiana Statute contemplates or requires and more than the policy provides for. The opinion, it is submitted, disregards no standing, unreversed, Indiana decision, and is in conflict with no other Circuit Court of Appeal's decision. The petition presents no conflict, within the scope or meaning of the provisions for writ of certiorari, and no question which, if decided by this Court, would settle the Indiana

law, or probably be applicable in another case of insurance contract construction in that state.

For reasons here, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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